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No. 94-6790

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARVEY F. GARLOTTE,
Petitioner,

v.

KIRK FORDICE,
Governor of Mississippi,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF

BRIAN D. BOYLE *
(Appointed by This Court)
JAMES R. ASPERGER
MATTHEW B. PACHMAN
PATRICK R. RIZZI
O'MELVENY & MYERS
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
Counsel for Petitioner

* Counsel of Record

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. A PRISONER SERVING A CONTINUOUS PERIOD OF CONFINEMENT UNDER CONSECUTIVE SENTENCES FOR SEPARATE COUNTS OF CONVICTION REMAINS "IN CUSTODY" UNDER THOSE COUNTS FOR THE AGGREGATE DURATION OF THE SENTENCES	2
II. *MALENG v. COOK* HAS NO APPLICATION WHERE, AS HERE, THE CHALLENGED CONVICTION AND SENTENCE CONTINUE TO CONTROL THE PRISONER'S POTENTIAL RELEASE DATE	8
III. THE PRECLUSIVE JURISDICTIONAL RULE URGED BY RESPONDENT IS INCONSISTENT WITH THE PURPOSES OF THE WRIT	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Ankensbrandt v. Richards, 112 S. Ct. 2206 (1992) .. 3
Armstrong v. State, 618 So. 2d 88 (Miss. 1993) 5
Brecht v. Abrahamson, 113 S. Ct. 1710 (1993) 14
Carafas v. LaVallee, 391 U.S. 234 (1968) 12, 13
Ex Parte Watkins, 3 Pet. (28 U.S.) 193 (1830) 11
Fawcett v. Bablitch, 962 F.2d 617 (7th Cir. 1992) .. 4
Fox v. Kelso, 911 F.2d 563 (11th Cir. 1990) 4
Haines v. Kerner, 404 U.S. 519 (1972) 8
Maleng v. Cook, 490 U.S. 488 (1989) 8, 9, 10, 11
McNally v. Hill, 293 U.S. 131 (1934), *overruled, Peyton v. Rowe*, 391 U.S. 54 (1968) 12
Moore v. Missouri, 159 U.S. 673 (1895) 9
Nichols v. United States, 114 S. Ct. 1921 (1994) 9
O'Neal v. McAninch, No. 93-7407 (U.S. Feb. 21, 1995) 13
Peyton v. Rowe, 391 U.S. 54 (1968) .....*passim*
Post v. Ruth, 354 So. 2d 1111 (Miss. 1978) 6
Railway Co. v. Whitton's Administrator, 13 Wall. (80 U.S.) 270 (1871) 6
Williams v. Puckett, 624 So. 2d 496 (Miss. 1993) .. 6-7

STATUTES

Miss. Code Ann. § 47-5-138(2) 5-6
Miss. Code Ann. § 47-5-139 4
Miss. Code Ann. § 47-5-139(2) 6
Miss. Code Ann. § 47-7-3(1)(c) 4, 7
28 U.S.C. § 2241(c)(3) 2, 3, 7, 10, 12
28 U.S.C. § 2254(d) 4, 13

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REPLY BRIEF

ARGUMENT

Respondent argues that a federal court must forge an artificial separation between consecutive sentences, and must deny jurisdiction under 28 U.S.C. § 2241(c)(3) unless the habeas petitioner establishes that the State is presently crediting the time being served in confinement to the challenged count of conviction. To sustain this position, Respondent ignores not only the logic of the Court's prior decision in *Peyton v. Rowe*, 391 U.S. 54 (1968), but also a wealth of Mississippi authorities establishing that Garlotte's consecutive sentences have been aggregated for all relevant purposes. Moreover, Respondent overlooks the fact that Garlotte's assertedly "expired" three-year sentence remains adjustable by the State, and thus determinative of his potential release date. Re-

spondent's arguments are thus without basis. Because Garlotte remains confined in part under the direct authority of his marijuana conviction and three-year sentence, and because that sentence continues to control his potential release date, Garlotte must be considered "in custody" under § 2241(c)(3) for purposes of the instant challenge.

I. A PRISONER SERVING A CONTINUOUS PERIOD OF CONFINEMENT UNDER CONSECUTIVE SENTENCES FOR SEPARATE COUNTS OF CONVICTION REMAINS "IN CUSTODY" UNDER THOSE COUNTS FOR THE AGGREGATE DURATION OF THE SENTENCES.

Respondent acknowledges the holding of *Peyton v. Rowe*, 391 U.S. 54 (1968), that "a prisoner serving consecutive sentences is '"in custody" under any one of them for purposes of [28 U.S.C.] § 2241(c)(3),'" (Brief for Respondent ("Resp. Br.") at 7 (quoting *Peyton*, 391 U.S. at 67)), but argues that this jurisdictional rule should have no force where the prisoner challenges a consecutive sentence that has technically expired. In addition, Respondent asks the Court to overlook the significant respects in which Mississippi law treats consecutive sentences as a single aggregate sentence for penological purposes. The logic of *Peyton* forecloses Respondent's approach.

According to Respondent, the *Peyton* Court's supposed reliance on the benefits to be derived from early adjudication of habeas claims requires that *Peyton*'s jurisdictional rule be confined to consecutive sentences that have not yet technically expired. (Resp. Br. at 8-15.) Yet while *Peyton* does recognize the benefits of early adjudication of habeas claims, *see Peyton*, 391 U.S. at 62-63, Respondent fails to explain how the Court could have premised a subject-matter jurisdictional holding—neces-

sarily bounded by the text of § 2241(c)(3)[1]—solely on the expedience of encouraging prompt habeas dispositions. No explanation is available. Judicial expedience, however compelling, could not alone have created "custody" in *Peyton* where the relevant statutory text did not support it, nor could expedience have been cited to exempt any class of habeas petitioners from the textual "in custody" requirement altogether.

Instead, while mindful of the wisdom of encouraging prompt collateral review of state criminal proceedings, the *Peyton* Court found "custody" in (and thus jurisdiction over) the entire duration of a prisoner's consecutive sentences in the very character of consecutive terms of confinement. "Practically speaking," the Court explained, a prisoner serving consecutive sentences faces confinement for "the aggregate" of those terms, *Peyton*, 391 U.S. at 64, and therefore should be considered " 'in custody' under any one of [those sentences] for purposes of § 2241(c)(3)," *id.* at 67. Significantly, *Peyton*'s textual construction comfortably embraces not only consecutive sentences not yet served, but also consecutive terms as to which the State contends the prisoner has technically completed service.

As Petitioner has explained, *Peyton*'s jurisdictional holding is firmly grounded in the customary operation of consecutive sentences. (*See* Brief for Petitioner ("Pet. Br.") at 8-14.) Respondent essentially concedes the point, acknowledging that "the earlier of consecutive sentences determines the timing of commencement and expiration of subsequent consecutive sentences." (Resp. Br.

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[1] *See Ankensbrandt v. Richards*, 112 S. Ct. 2206, 2212 (1992) (Congress possesses " 'the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' " (quoting *Cary v. Curtis*, 3 How. (44 U.S.) 236, 245 (1845))).

at 13.) Respondent nevertheless urges that an earlier sentence ceases to control the timing of the prisoner's release from confinement under consecutive sentences—and, presumably, is no longer amenable to adjustment—the moment the earlier sentence has "expired." *Id.*

Respondent cites no authority for this assertion, and for good reason. The cases that address the point assume that where the first of two consecutive sentences is vacated, even after its technical expiration date, the second sentence must run from the date of its imposition. *See Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992) (consecutive sentences imposed under Wisconsin law); *Fox v. Kelso*, 911 F.2d 563 (11th Cir. 1990) (consecutive sentences imposed under Georgia law); *see also* Pet. Br. at 10 n.5 (citing cases regarding the vacation of consecutive sentences generally). Respondent also fails to explain why the unitary nature of consecutive sentences *should* change on the nominal date on which the first sentence would have expired had it stood alone, as that date works no effect on the character of the prisoner's custody either from the standpoint of the prisoner or the State. For example, with few exceptions, the order in which Mississippi prisoners have been directed to serve consecutive sentences and the lengths of the individual sentences in the consecutive sequence matter not a whit for such purposes as the timing of parole eligibility and the computation of "earned time" and "meritorious earned time" credits.[2] *See* Miss. Code Ann. § 47-5-139; § 47-7-3(1).

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[2] Respondent argues that "state law is not controlling on the issue of jurisdiction under 28 U.S.C. § 2254" (Resp. Br. at 15 (citing *United States v. Bustillos*, 31 F.3d 931 (10th Cir. 1994)), but this Court has made clear that the state law delineating the terms of a habeas petitioner's confinement is keenly relevant to the question whether the petitioner is "in custody" for habeas purposes. Thus, in *Peyton* itself, the Court found it appropriate to regard consecutive sentences as unitary in part because Virginia law treated such sentences as a single aggregate sentence for

Respondent dismisses the actions of the Mississippi Department of Corrections in adjusting Garlotte's three-year marijuana sentence long after its supposed expiration, but those actions compellingly contradict Respondent's core contention. To recall, in 1992 the Department of Corrections made earned-time and meritorious earned time adjustments to the length of Garlotte's three-year marijuana sentence, and credited the time served against his life sentences. These actions in Garlotte's favor took place six years after June 1, 1986, the date on which—according to Respondent's assertions here—Garlotte's three-year sentence "fully expired." (*See* Resp. Br. at 19.) For Respondent, the "easy answer" to this conundrum is that the Department of Corrections simply acted pursuant to a change in the State's law of commutation. (*Id.*) But that explanation simply begs the question of how, in 1992, this change in law could have been applied to redetermine a sentence that supposedly was final and no longer subject to redetermination several years earlier.[3]

What the Mississippi Department of Corrections has retroactively granted, it can take away, and this is the critical point.[4] Notwithstanding Respondent's contention

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purposes of the timing of parole eligibility. *Peyton*, 391 U.S. at 64; *see also id.* at 56 n.3.

[3] Notably, this is not the first time that Respondent has had difficulty identifying to a court the date on which the first of a prisoner's consecutive sentences ends and the next begins. *See Armstrong v. State*, 618 So. 2d 88, 90 (Miss. 1993) ("The inconsistencies in the record . . . do not reflect whether prior to parole Armstrong finished serving the robbery sentence and began to serve the escape sentence."). *Armstrong* provides a handy illustration of the practical difficulties posed by Respondent's proposed rule. Where, as here, a prisoner's nominal discharge date on the first of two consecutive sentences is repeatedly altered by corrections officials, a post-conviction court is faced with a constantly moving target for purposes of determining jurisdiction.

[4] *See* Miss. Code Ann. § 47-5-138(2) ("An inmate may forfeit all or part of his earned time allowance for a serious violation of

that Garlotte "is now in custody on the concurrent life sentences" (Resp. Br. at 20), the Mississippi Department of Corrections is free to re-enlarge Garlotte's marijuana sentence, and potentially lengthen his overall period of imprisonment, for as long as Garlotte remains confined. *See Post v. Ruth*, 354 So. 2d 1111, 1113 (Miss. 1978) ("The earned time does not become vested until the prisoner is entitled to be discharged after receiving credit for good time."); *see also id.* (" 'As a general rule the right to a good-time allowance is contingent until the time arises that its allowance will end imprisonment . . . .' " (quoting *Douglas v. Sigler*, 386 F.2d 684, 686 (8th Cir. 1967))). Respondent's position is thus a curious one: The Mississippi Department of Corrections may still adjust Garlotte's marijuana conviction and sentence and thereby lengthen his term of confinement, but that conviction and sentence—having technically "expired"—are beyond the reach of federal process. Such arguments have traditionally been given a cool reception in the federal courts. *Cf. Railway Co. v. Whitton's Administrator*, 13 Wall. (80 U.S.) 270, 286 (1871) ("Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.").

In any event, Garlotte's potential release date on his consecutive sentences, the date of greatest significance to the State and to Garlotte alike, is a function of the two sentences' minimum service terms combined.[5] (*See* Pet.

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rules"); *id.* § 47-5-139(2) ("An offender under two . . . or more consecutive sentences shall be allowed commutation based upon the total term of the sentences").

[5] Respondent cites *Williams v. Puckett*, 624 So. 2d 496 (Miss. 1993), for the proposition that "consecutive sentences are treated separately for parole purposes" (Resp. Br. at 18), but other authorities cited by Respondent belie the point. For instance, Miss.

Br. at 17-19.) Thus, should his sentences remain unchanged, when Garlotte becomes eligible for parole after being in prison for ten years and ten months, he will not have technically completed serving the full time associated with either of the sentences imposed on him.[6] The manner in which Garlotte's potential release from his continuous period of confinement is determined exposes the insignificance for purposes of § 2241(c)(3) of a consecutive sentence's technical "expiration" date. As the *Peyton* Court recognized, it is inappropriate to cleave an artificial separation between two consecutive sentences on the basis of their respective contributions to the prisoner's overall term of confinement. Irrespective of the technical status of Garlotte's three-year marijuana sentence as submitted by Respondent, Mississippi law confirms that the

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Code Ann. § 47-7-3(1)(c), set out in its entirety in Respondent's brief, imposes minimum terms of confinement based upon the total length of the prisoner's "sentence *or sentences.*" Miss. Code Ann. § 47-7-3(1)(c) (emphasis added); *see also id.* § 47-7-3(1) (parole eligibility accorded prisoners "who ha[ve] served not less than one-fourth (¼) of *the total of such term or terms* for which such prisoner was sentenced" (emphasis added)). Of course, as Petitioner noted in his opening brief (*see* Pet. Br. at 16-17), *Williams* does require prisoners serving sentences that include statutory minimum periods of incarceration (as do Garlotte's life sentences) to serve each such minimum period specified by law prior to becoming eligible for parole. *Williams*, 624 So. 2d at 498-99. Nevertheless, even in these circumstances, Mississippi law aggregates these service periods to arrive at a single parole eligibility date for the consecutive sentences.

[6] Had the order in which Garlotte was directed to serve his sentences ostensibly been reversed (so that the concurrent life sentences were credited first), Garlott's date of initial parole eligibility would have been the same, even though he would not technically have begun to serve his three-year marijuana sentence. Ironically, had Garlotte been ordered to serve his concurrent life sentences first, there would have been no effect on his actual detention or his initial parole eligibility date, but there would be no question that he could have challenged either of his sentences throughout the duration of his natural life.

marijuana sentence continues to control his potential release date, and thus continues to impose direct restraints on his freedom.

II. *MALENG v. COOK* HAS NO APPLICATION WHERE, AS HERE, THE CHALLENGED CONVICTION AND SENTENCE CONTINUE TO CONTROL THE PRISONER'S POTENTIAL RELEASE DATE.

Respondent argues that *Maleng v. Cook*, 490 U.S. 488 (1989), forecloses federal habeas jurisdiction over Garlotte's marijuana conviction because the continuing postponement of Garlotte's parole eligibility constitutes a mere "collateral consequence" of that conviction. (Resp. Br. at 22-23 (quoting *Garlotte v. Fordice*, 29 F.3d 216, 218 (5th Cir. 1994)).)[7] Respondent's premise is false. Garlotte is currently confined in part under the direct authority of his marijuana conviction and three-year sen-

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[7] Even assuming *arguendo* that Respondent were correct on this point, it does not follow that a federal habeas remedy is unavailable to Garlotte. Respondent overlooks the fact that the *Maleng* Court actually sustained habeas jurisdiction over a prisoner's subsequent confinement as collaterally affected by the prior conviction. That is, under *Maleng*, where the asserted "collateral effect" of an expired conviction is the enlargement or enhancement of a subsequent sentence that remains executory, jurisdiction lies—at the very least—over that subsequent confinement.

Garlotte submits that he remains "in custody" for federal habeas purposes under his marijuana conviction and sentence. Nevertheless, were the Court to conclude that this case should be governed by the principle of *Maleng*, *Maleng* would counsel the construction of Garlotte's *pro se* habeas petition as asserting a challenge to his concurrent life sentences as postponed or delayed by that conviction. *Maleng*, 490 U.S. at 493; *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (filings of *pro se* litigants must be interpreted with deference). Because Garlotte may well have other substantive challenges to the convictions underlying his concurrent life sentences, any remand for this purpose should be structured to permit Garlotte either to supplement his federal habeas petition with additional claims or to withdraw his petition pending the exhaustion of state remedies on such other claims.

tence, and that conviction and sentence continue to control the date of his potential release from confinement. These custodial incidents are not "collateral."

The circumstances that led the *Maleng* Court to conclude that any effects suffered by the prisoner in that case were "collateral" in nature are not remotely present here. The two sentences considered in *Maleng* were not imposed consecutively; the commencement date of the later sentence was in no respect a function of the validity or expiration of the earlier. Rather, in *Maleng* the only continuing disability imposed by the prisoner's expired conviction flowed from his *status* as a felon. Although this status was used as a basis for enhancing the petitioner's second sentence, double jeopardy principles obviously precluded the attribution of any resulting "custody" to his prior, fully-served conviction. *See, e.g., Nichols v. United States*, 114 S. Ct. 1921, 1927 (1994) ("[R]ecidivist statutes . . . do not change the penalty imposed for the earlier conviction."); *Moore v. Missouri*, 159 U.S. 673, 676 (1895) ("The increased severity of the punishment for the subsequent offence is not a punishment for the same offence for the second time, but a severer punishment for the subsequent offence . . . ."). Instead, the *Maleng* petitioner's confinement was properly attributable only to the later conviction and sentence, and only that sentence remained properly subject to federal habeas review. *Maleng*, 490 U.S. at 492-93.

By contrast, where the habeas petitioner has been ordered to serve a continuous period of confinement under consecutive sentences, each of the sentences remains instrumental in determining the petitioner's release date throughout the aggregate duration of the petitioner's confinement. In no sense does one consecutive sentence enlarge or change the character of any other consecutive sentence in the sequence; to the contrary, each sentence discretely specifies the portion of the petitioner's overall confinement that is attributable to each of the underlying

counts of conviction. Yet the symbiotic relationship of consecutive sentences renders the confinement under either subject to the validity of both. In part because of this unique relationship, each underlying conviction remains a basis for the prisoner's confinement until the date of the prisoner's release.[8]

Garlotte's petition is distinguishable from that addressed in *Maleng* in another important respect: fealty to the role of "custody" in delimiting federal habeas jurisdiction. The principal difficulty with the position urged by the prisoner in *Maleng* was its subversion of this congressionally-imposed requirement. *See Maleng*, 490 U.S. at 487. As the Court observed, if the mere "*possibility* that [an expired] conviction will be used to enhance the sentences imposed for any subsequent crimes" established "custody" under 28 U.S.C. § 2241(c)(3), the prevalence of habitual offender and sentence enhancement statutes would mean that "a petitioner whose sentence has completely expired could nonetheless challenge the conviction for which it was imposed at *any time* on federal habeas." *Id.* By contrast, *Peyton*'s rule requiring the aggregation of consecutive sentences presents no such threat to the integrity of Congress's review scheme. The period in which the federal habeas remedy remains available extends not a day beyond the continuous period of confinement imposed by the State.

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[8] Amicus Criminal Justice Legal Foundation ("CJLF") concedes that under the rule adopted by the court below "a person who is guilty of one crime but sentenced for two could serve a somewhat longer sentence than the law prescribes for the second, valid conviction." (Brief for CJLF as Amicus Curiae ("CJLF Br.") at 20.) Nevertheless, CJLF argues that the likelihood that such a valid claim would evade state court review (such as to require correction by a federal court) is so small that the availability of federal habeas review should be confined in such circumstances. (*Id.*) This efficiency-oriented argument is simply a reprise of CJLF's call for the outright abolition of federal habeas corpus—a request that even CJLF admits is properly addressed to Congress rather than this Court. (*See id.* at 6.)

At bottom, *Maleng* turned on the fact that the challenged sentence had "fully expired." *See Maleng*, 490 U.S. at 491. As Garlotte has established, the first of two consecutive sentences does not "fully expire" until the prisoner is released from confinement.

III. THE PRECLUSIVE JURISDICTIONAL RULE URGED BY RESPONDENT IS INCONSISTENT WITH THE PURPOSES OF THE WRIT.

From its inception at common law, the "great object" of the writ of habeas corpus has been the termination of unconstitutional confinement. *See, e.g., Ex Parte Watkins*, 3 Pet. (28 U.S.) 193, 202 (1830) (Marshall, C.J.) ("The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause." (emphasis in original)). The rule urged by Respondent is offensive to this tradition.

Respondent never takes a clear position concerning the effect—under Mississippi law or otherwise—of invalidation of a technically "expired" consecutive sentence on the habeas petitioner's aggregate period of confinement. For Respondent, the question is unimportant. No matter how a prisoner's overall confinement might be adjusted in the event one of his consecutive sentences were invalidated or commuted, Respondent argues that the duration of a prisoner's right to federal habeas review must be measured by the discrete periods that the challenged convictions ostensibly account for in the prisoner's overall confinement, and by the order in which the State considers those convictions discharged. Thus, even if a prisoner serving two consecutive five-year sentences could establish (early in his service of the second term) that the first conviction were constitutionally invalid, thus entitling him to immediate release under the governing state law, Respondent would find federal habeas jurisdiction over the first conviction wanting. So also with Garlotte's petition: Even though invalidation of Garlotte's mari-

juana conviction and sentence would advance the date of Garlotte's initial eligibility for release on parole (a fact not denied by Respondent), Respondent submits that the federal courts are powerless to address the validity of that conviction and sentence.

Respondent's submission ignores that the question of a prisoner's entitlement to release from detention is not simply a sideshow under the federal habeas corpus statute, but rather its core remedial inquiry. The days have long since passed when the writ was extended *only* to those prisoners who could demonstrate a constitutional entitlement to "immediate release" from confinement. *See, e.g., McNally v. Hill*, 293 U.S. 131, 138 (1934), *overruled by Peyton v. Rowe*, 391 U.S. 54 (1968). But at no point has availability of the writ fallen below the low watermark of "immediate release." That is the undeniable effect of the rule Respondent advances. Only if 28 U.S.C. § 2241(c)(3) *required* such a result would it be appropriate to lend judicial sanction to Respondent's interpretation.[9] It does not.

To bolster a jurisdictional rule that is so fundamentally at odds with the tradition of the writ, Respondent attempts to denigrate the rule sought by Garlotte. Respondent's chief contention is that making the writ available to prisoners in Garlotte's circumstances would constitute an "[u]nwarranted [e]xpansion" of federal habeas jurisdiction. (Resp. Br. at 25.) Respondent explains that a rule allowing prisoners serving consecutive sentences to challenge any conviction underlying those sentences "would not deny a federal remedy to one with a constitutional claim to any greater extent than do procedural bars." (*Id.* at 25-26.) Respondent is correct to this extent: A rule foreclosing habeas jurisdic-

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[9] *See Carafas v. LaVallee*, 391 U.S. 234, 240 (1968) (interpretation of § 2241(c)(3) under which jurisdiction over properly instituted habeas proceeding would be defeated upon petitioner's release from custody rejected in part because "[t]he federal habeas corpus statute does not require [such a] result").

tion over technically "expired" consecutive sentences would, indeed, work like a "procedural bar." But unlike a procedural bar, Respondent's suggested approach would deprive prisoners of federal review, and potentially foreclose opportunities for immediate release, without ascribing any fault to the prisoners in terms of their elections or omissions under the State's procedural rules. For instance, a prisoner ordered to serve consecutive two-year and fifty-year sentences would—in the event exhaustion of the State's post-conviction remedies took more than two years to complete—be without a federal remedy under Respondent's regime (with respect to the two-year sentence), even though the delays in the exhaustion process were not of the prisoner's making. After *Carafas*, at least, such an interpretation of the habeas statute that consigns prisoners "to serious disabilities because of the law's complexities and not because of [their] fault" is to be avoided if at all possible. *Carafas*, 391 U.S. at 239.

Without supporting the point, Respondent adds that a rule recognizing jurisdiction over Garlotte's petition would "encourage and reward delay in the assertion of habeas challenges." (Resp. Br. at 28.) This is wrong. A prisoner serving a continuous period of confinement under consecutive sentences is no more likely to favor a delay in bringing challenges to the convictions underlying his sentences than a prisoner serving a single sentence (or concurrent sentences) of equivalent overall length. For each such prisoner, an additional day's delay in bringing a constitutional challenge is an additional day in assertedly unlawful confinement. And because it is the petitioner who generally must bear the burden of proof in a habeas proceeding, *see* 28 U.S.C. § 2254(d) (applicant "shall establish" that state court proceeding was flawed),[10] any delay in seeking the writ will dispropor-

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[10] *Compare, e.g., O'Neal v. McAninch*, No. 93-7407, slip op. (U.S. Feb. 21, 1995) (habeas petitioner held entitled to relief where district court harbors "grave doubt" concerning whether constitu-

tionately impair the petitioner's ability to establish the essential factual prerequisites for his constitutional claim. *Cf. Peyon*, 391 U.S. at 62 ("Postponement of the adjudication of [habeas] issues for years can harm both the prisoner and the State").

The benefits of prompt initiation and completion of federal collateral review proceedings are undeniable; *Peyton* itself champions those benefits. *See id.* at 62-63. Nevertheless, the fact remains that Congress elected to permit those subject to allegedly unconstitutional confinement—even those subject to life imprisonment—to seek the writ of habeas corpus at any point during that confinement. Recognizing jurisdiction over Garlotte's consecutive sentences, as aggregated, is consistent with Congress's election.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the Fifth Circuit should be reversed and the cause remanded to that court for consideration of Garlotte's claims on the merits.

Respectfully submitted,

BRIAN D. BOYLE *
(Appointed by This Court)
JAMES R. ASPERGER
MATTHEW B. PACHMAN
PATRICK R. RIZZI
O'MELVENY & MYERS
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
Counsel for Petitioner

* Counsel of Record

April 11, 1995

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tional error affected verdict) *with, e.g., Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993) ("[H]abeas petitioners . . . are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'").